COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

J. D. THOMAS
DIRECT DIAL
202-828-9773
DTHOMAS@CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 24, 2001

VIA COURIER

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW B-204
Washington, D.C. 20554

Re: In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996; CC Docket No. 98-146

Dear Ms. Salas:

Enclosed please find an original and four (4) copies of **Comments of Global Photon Systems, Inc. In Response To Third Notice of Inquiry** for filing in connection with the above-referenced matter.

Should you have any questions, please do not hesitate to contact me at the above phone number.

Thank you.

Sincerely,

J. D. Thomas

Enclosures
cc w/enc: Global Photon Systems, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996

CC Docket No. 98-146

COMMENTS OF GLOBAL PHOTON SYSTEMS, INC. IN RESPONSE TO THIRD NOTICE OF INQUIRY

GLOBAL PHOTON SYSTEMS, INC.

John Davidson Thomas
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

- and -

Jeremy H. Stern
Robert Jystad
COLE, RAYWID & BRAVERMAN, LLP
2381 Rosecrans Avenue
Suite 110
El Segundo, CA 90245
(310) 643-7999

Dated: September 24, 2001

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	CC Docket No. 98-146

To: The Commission

COMMENTS OF GLOBAL PHOTON SYSTEMS, INC. IN RESPONSE TO THIRD NOTICE OF INQUIRY

Global Photon Systems, Inc. ("Global Photon") respectfully submits these comments in the above-captioned proceeding.[1] Specifically, Global Photon addresses the Commission's question in Sections V and VI of the Third Notice which asks whether deployment is reasonable and timely and what can be done to accelerate deployment.

INTRODUCTION AND SUMMARY

Global Photon respectfully requests that the Commission move with deliberate speed to curtail abuses of recalcitrant federal, state and local right-of-way ("ROW") permit agencies in order to accelerate the deployment of broadband technology to all Americans. Immediate action is required. Together with the availability of financing, which itself can be jeopardized by unreasonable right-of-way access delays, government obstruction to ROW access is the single

[1] Notice of Inquiry, *Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to*

greatest challenge that Global Photon faces. Troubling as it has been in the past, there should be even greater intolerance for these obstructions during this time of heightened national security when telecommunications system redundancy like that Global Photon's network provides is at a premium.

Global Photon is a facilities-based provider of wholesale broadband communications capacity and services. Operating today in California and headquartered in San Diego, Global Photon's mission is to provide critical submarine fiber optic cable infrastructure for high-speed transport of voice, data, and Internet traffic utilizing a self-healing fiber-optic cable network. Global Photon's Global West Network will connect California's coastal cities from San Francisco to San Diego (and major cities in between) with innovative undersea optical network technology.

Following the events of that tragic date, network redundancy has become a strategic national security imperative. In addition, California Governor Gray Davis's Trade and Commerce Agency characterized the Global Photon project as a "critical benefit to California's economic future" and explained that Global Photon's Global West Network "fulfills the need for critical infrastructure protection in California." Currently, much of the broadband and telecommunications traffic between and among California's coastal cities flows through terrestrial fiber optic route along Highway 101, making this concentration of network facilities "vulnerable to a single catastrophe," according to the California Office of Emergency Services.

As described below, Global Photon and other carriers in California face an increasingly defiant group of ROW permit agencies and must devote substantial resources in the daily struggle to prevent these agencies from imposing the "third tier" of telecommunications

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Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146 (rel. Aug. 10, 2001) ("Section 706 NOI").

regulation that Congress sought to prohibit in the 1996 Telecommunications Act. Many of the local, state and federal entry barriers that Global Photon faced even before September 11, 2001 were illegal and/or nonsensical. Today, however—and without overstating the changed nature of our Nation and world—they simply must be dispensed with.

Despite the offshore deployment of most of Global Photon's network, the company is confronted regularly with delays and extortionate demands from ROW permit agencies that recognize the leverage they have over "bottleneck" landing points and use this leverage in flagrant violation of federal and state law. In the deployment of its California and Pacific Coast network, Global Photon has faced onerous application, permitting, environmental and regulatory requirements and demands for lump-sum payments in the hundreds of thousands of dollars, not to mention revenue-based recurring payments. All are at odds with prevailing law and Commission policies, and among the abuses that Global Photon has faced are that:

- Global Photon has been required to "volunteer" one-time and recurring payments that will be used to fund projects unrelated to the ROW – despite clear prohibitions in California state law.

- Some ROW permit agencies have attempted to extract ownership interests in Global Photon's network.

- Many ROW permit agencies are attempting to extract free telecommunications services or network facilities such as discounted service or free conduit as forms of in-kind compensation for ROW access.

- ROW permit agencies have demanded "most favored nations" requirements on compensation to other agencies.

- Other ROW permit agencies have attempted to regulate the operation of telecommunications networks, something that Section 253 prohibits, by regulating the transfer of indefeasible rights of use ("IRUs") and the assignment or transfer of ownership of ROW facilities.

- One Federal ROW Permit Agency, NOAA, is looking to establish a "fair market value" standard for ROW access compensation that could be in excess of $120,000 per mile. Furthermore, the delays the company has faced before this agency have

caused it to divert its attention to other projects, impacting the deployment of its network in Northern California.

Carriers such as Global Photon remain vulnerable to these exactions because of the simple economic proposition they face – in some cases, is simply cheaper to pay the toll than to wait indefinitely for a permit authorization. Such delays may cost the company millions of dollars in lost revenue or additional construction costs. The jury is still out regarding whether small but vital companies like Global Photon can continue to pay the ransoms demanded and still remain financially viable.

That is why it is imperative for the Commission to take action immediately to ensure that barriers to entry are effectively removed through Commission action pursuant to Section 253(d) or through Congressional revisions to the statute. Global Photon respectfully urges the Commission to act now on the following recommendations:

Reasonable ROW Regulations: The Commission must clarify the boundaries of Section 253 by:

- Issuing rules requiring ROW permit agencies to issue permits within 60 days.
- Issuing rules imposing fines on ROW permit agencies that intentionally delay the issuance of a permit.
- Prohibiting ROW permit agencies from regulating service offerings or operations of telecommunications carriers.
- Prohibiting ROW permit agencies from regulating the transfer of IRUs or the sale of ROW assets between or among certificated carriers.

Reasonable Row Fees: The Commission must remove the ability and incentive of ROW permit agencies to extort unreasonable fees from telecommunications carriers by:

- Prohibiting ROW permit agencies from exacting subsidies from telecommunications carriers in the form of free service or facilities dedication.

- Limiting ROW fees to reasonable fixed and variable costs of the permit agencies in regulating the public ROW.

- Preventing permit agencies from evading the fee limitations by prohibiting them from requiring carriers to waive their rights to challenge fees as a condition of the ROW permit.

Alternative Dispute Resolution: The Commission should implement an ADR "rocket docket" procedure under its rules that allow for carriers to bring ***bona fide*** ROW disputes with state and local permitting agencies to a quick resolution.

Private Right of Action under §253: The Commission should recommend to Congress that it amend Section 253 to make clear that carriers can sue state and local permit agencies.

Elimination of Entry Barriers by the Federal Government: Finally, the Commission should urge Congress to take action to limit these agencies' ability to impose ***federal*** entry barriers to competitive deployment.

The Commission considers the issues in this NOI at a particularly critical time. Not only is the vital domestic goal of facilities-based competition in the telecommunications industry at stake because of market factors, but the Country's national security will, in part, rest on the ability of telecommunications infrastructure to withstand physical attack. The Commission must act now to assert its authority and leadership to ensure that telecommunications carriers can quickly build out infrastructure to insure vibrant competition and strategically vital network redundancy.

I. BACKGROUND

Global Photon, a wholesale provider of broadband communications services, has identified a few key factors that distinguish its network design and deployment and service offerings, that drive its business plan and that set it far apart from other providers. Global Photon, however, is faced with many of the same entry barriers and other obstacles that

government authorities attempt to impose upon facilities based providers without corresponding public benefit. Local, state, and federal government obstruction to rights-of-way access is the greatest challenge that Global Photon faces. Global Photon initially faced expensive and time-consuming obstacles imposed by the State of California, which affected the ability to deploy on a timely and cost-effective basis. More importantly, one agency of the federal government effectively prevented Global Photon's deployment of an undersea broadband network in Northern California that would have provided critical infrastructure protection for existing terrestrial networks. These Northern California routes follow the same Highway 101 telecom corridor due to the topographical restrictions of the Coastal Mountain Ranges. Global Photon's unique coastal network was supported by the State of California Office of Emergency Services, the Federal Emergency Management Agency, the California Department of Trade and Commerce, and the California Institute of Telecommunications and Information Technology. Nevertheless, the Northern California portion of the network was not deployed, and the funding for this unique "critical infrastructure protection" project was placed in jeopardy. Troubling as they have been in the past, there should be even greater intolerance for these obstructions during this time of heightened national security when system redundancy like that Global Photon's network provides is at a premium.

A. The Global Photon Network

Global Photon is a facilities-based provider of wholesale broadband communications capacity and services. Operating today in California and headquartered in San Diego, Global Photon's mission is to provide critical infrastructure for high-speed transport of voice, data, and Internet traffic utilizing a self-healing fiber-optic cable network. Global Photon's West Coast subsidiary Global West Networks Inc. ("Global West") will connect California's coastal cities

from San Francisco to San Diego (and major cities in between) with innovative undersea optical network technology. This diverse sea route will provide a reliable alternative to the land-based fiber-optic networks installed along the Highway 101 telecom corridor.

The environmentally benign Global West cable, installed approximately several miles off the California coast, utilizes exclusively land-based power supplies provides at least 16 terabits (16 trillion bits) bits per second without the use of undersea repeaters or amplifiers. All active electronic components are placed in secure terrestrial sites.

To date, Global Photon has installed more than 560 route miles and 27,000 fiber miles of undersea cable. The Global West Network is comprised of three undersea segments and three terrestrial segments offering a robust protected architecture. The network provides highly reliable diverse connectivity, offering direct efficient routing between downtown San Francisco, San Jose, San Luis Obispo, Santa Barbara, Los Angeles and San Diego and linking the International Gateway in San Luis Obispo via a dedicated self-healing ring. Additional details regarding Global Photon's network and services are available on its website at www.globalphoton.com.

While Global Photon's principal distinction is that the primary network is constructed under the sea, critical segments are constructed terrestrially to connect with co-location and customer sites. While occasionally Global Photon is required to perform some excavation on the over-land portions of its route, wherever possible Global Photon installs its network with the minimum possible disruption to city streets and the environment.

Because Global Photon is not a retail or local services provider, it does not sell capacity or services to local communities. While sometimes Global Photon connects directly with customers at the six points of presence ("POP") located in San Diego, Los Angeles, Santa

Barbara, San Luis Obispo, San Jose and San Francisco. However in order to connect with these sites, the cable passes through many jurisdictions via existing conduit. As set forth in greater detail below, local governments up and down the California coast have insisted on making demands of the Company, clearly in violation of Section 253. As indicated, these measures, many of which cross the line to outright extortion, threaten not only Global Photon's ability to deploy its network rapidly and efficiently, but also Congress' vision of accelerated network construction and a competitive marketplace.

B. The Importance Of Redundancy

Network redundancy is a cornerstone of telecommunications system design, telecommunications policy and everyday life. From self-healing SONET and other networks that seamlessly re-route transmissions in the event of a cable cut or other catastrophic network event, to two separate residential telephone lines (in some homes necessary for telecommuting or talkative teenagers) redundancy is and must be embedded in our communications systems. The Internet, probably the single greatest advance in the history of network communications (eclipsing even the creation (and breakup) of the Bell System and development of the INTELSAT system), was developed by the Defense Department in the late 1960s during the height of the Cold War as a backup to the public switched telephone network ("PSTN") that would be vulnerable to nuclear attack.[2] The critical role of redundancy was highlighted during the September 11, 2001 attacks on our Nation when destruction of office PBXs (private branch exchanges) forced the use of cell phones, email over the Internet, and payphones on the street.[3]

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[2] *See, e.g.*, Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy,* OPP Working Paper No. 29, Federal Communications Commission, March 1997, p. 13.

[3] *See* Exhibit 1, Lisa Guernsey, *An Unimaginable Emergency Put Communications to the Test,* N.Y. TIMES, Sept. 20, 2001.

Designed and installed to provide additional mega bandwidth and critical diverse off-shore redundancy to the California coast, Global Photon's Global West Network provides a vital alternative to the existing telecom corridor in California, currently located exclusively along Highway 101 and the Interstate 5—diverse, reliable telecommunications infrastructure is likely to become even more important as we move into a period of enhanced concern for national security and additional terrorist attacks. California Governor Gray Davis's Trade and Commerce Agency characterized the Global West project as a "critical benefit to California's economic future" and explained that Global West "fulfills the need for critical infrastructure protection in California. The Network will provide 'route diversity,' which allows information to keep flowing along separate physical paths through the system, even if one link is disabled."[4] The Director of the Governor's Office of Emergency Services explained the need for this alternate fiber route in additional detail:

> At the present time all high-speed fiber optic transport providing direct coastal city to coastal city connections is installed along U.S. Highway 101 an/or coastal railroad corridor. This seems to have been the path of least resistance, at least in terms of the permitting of new telecom installation. Unfortunately, this concentration continues to make the fiber optic transport vulnerable to a single catastrophe, whether from a construction mishap or from a seismic event.[5]

As described below, many of the local, state and federal entry barriers that Global Photon faced even before September 11 were illegal and/or nonsensical. Today, however—and without overstating the changed nature of our Nation and world—they simply must be dispensed with. This is not to say that there is no room for coordination between private providers like Global

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[4] *See* Exhibit 2, Letter from Lon S. Hatamiya, Secretary, California Trade and Commerce Agency, to Sara Wan, Chair of the California Coastal Commission (Dec. 11, 2000).

[5] *See* Exhibit 3, Letter from Dallas Jones, Director of the Governor's Office of Emergency Services, to Sara Wan, Chair of the California Coastal Commission (December 5, 2000) .

Photon on the one hand, and federal, state and local governments on the other. Rather, the relentless reflex of some in government to over-regulate and literally extort financial concessions from telecommunications providers must stop immediately, [6] so that the important work of protecting and strengthening our infrastructure[7] can proceed without petty obstacles. This directive has been the law since at least 1996, 47 U.S.C. § 253, and recent events require that the Commission and others enforce it unflinchingly and speedily.

II. GOVERNMENT OBSTRUCTIONS TO DEPLOYMENT

Congress enacted the Telecommunications Act of 1996 ("1996 Act")[8] to advance a "pro-competitive, de-regulatory national policy framework designed to *accelerate rapidly* private sector deployment of advanced technologies and services...by opening all telecommunications markets to competition...."[9] In particular, Congress enacted Section 253 to facilitate the entry of competitive telecommunications providers into the market by prohibiting local barriers to entry and restricting local government control over telecommunications carriers to legitimate public right-of-way management functions, such as traffic control, insurance and bonding, and enforcement of construction standards.[10] The Commission has interpreted Section 253 to prohibit

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[6] Indeed, the realization that profit must cede to more vital and enveloping community concerns is obvious to even the most thick-skinned. *See* Exhibit 4, Peter Grant, *Displaced Firms Find Space, Grace from Landlords,* WALL STR. JNL., Sept. 19, 2001, at A10.

[7] *See* Exhibit 5, Alex Salkever, *Who's Protecting our Infrastructure,* BUSINESSWEEK, Sept. 18, 2001 at http://www.businessweek.com/bwdaily/dnflash/sep2001/nf20010918_8931.htm.

[8] Pub. L. No. 104-104, 110 Stat. 56 (1996) codified at 47 U.S.C. §§ 151 et seq. (West 2000).

[9] *Id., quoting* H.R. Conf. Rep. No. 104-458, at 206 (1996) (*emphasis added*).

[10] *See* the FCC's recently filed *amicus* brief in *TCG New York v. City of White Plains,* No. 01-7212(L), p. 8, which states: "Congressional intent to prohibit State and local governments from imposing barriers to local telecommunications competition is clear from the language of Section 253, and the elimination of such barriers is central to the purpose of the 1996 Act." For examples of legitimate rights-of-way management functions, *see, e.g., In the Matter of Classic Telephone, Inc.,* FCC 96-397, ¶ 39 citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995)

attempts by local governments to impose a third tier of regulatory controls over the industry.[11] Over the past year, a number of federal courts in the state of California and elsewhere, including the United States Court of Appeals for the Ninth Circuit, have interpreted Section 253 as severely restricting the rights of local government authorities to impose entry barriers to facilities-based providers.[12] In other contexts, California courts have recognized that local governments can abuse their power over the rights of way to the detriment of communications providers.[13]

(statement of Sen. Feinstein, quoting letter from the Office of the City Attorney, City and County of San Francisco): "During Senate Floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under 253(c), including State and local requirements that (1) 'regulate the time or location of excavations to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts' (2) 'require a company to place its facilities underground, rather than overhead, consistent with requirements imposed on other utility companies' (3) 'require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation,' (4) 'enforce local zoning regulations,' and (5) 'require a company to indemnify the City against any claims of injury arising from the company's excavation.'"

[11] *See TCI Cablevision of Oakland County, Inc.*, FCC 97-331 (Sept. 18, 1997), ¶ 105 (expressing concern that "localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant "third tier" of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public"). *See AT&T Communications of the Southwest v. City of Dallas,* 8 F.Supp.2d 582, 592 (N.D.Tex. 1998) *reversed on other grounds* (intervening state statute that prohibits local franchising of providers) *cited* in *AT&T Communs. of the Southwest, Inc. v. City of Dallas,* 243 F.3d 928, 2001 U.S. App. LEXIS 3890 (5th Cir. Tex. 2001) (third tier regulation is any regulation that exceeds appropriate right-of way management such as coordination of construction schedules, bonding and indemnity, construction codes and tracking.)

[12] *See, e.g., City of Auburn v. Qwest Corp.,* 247 F.3d 966, 980 (9th Cir. 2001) (sweeping decision affirmed that Section 253 of the Communications Act severely limits the power of local governments to franchise or regulate the business of telecommunications providers, and characterizes the preemptive scope of Section 253 as "virtually absolute"); *see also Qwest Communications Corporation v. City of Berkeley*, 146 F.Supp.2d 1081 (N.D. Cal. 2001) (local ordinance with lengthy application and permit process that requires detailed disclosures constitutes a barrier to entry in violation of Section 253). *See also TCG New York, Inc. v. City of White Plains,* 125 F.Supp.2d 81 (S.D.N.Y. 2000) (long delay from lengthy and complex negotiation and regulation beyond the circumscribed scope of activities related to public rights-of-way is outside the scope of 253(c)); *New Jersey Payphone Assn., Inc. v. Town of West New York,* 130 F. Supp. 2d 631, 638 (D.C.N.J. 2001). ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry").

[13] *See, e.g., Charter Communs. v. City of Santa Cruz,* 133 F.Supp.2d 1184, (N.D. Cal. 2001) ("The County gave its agents unfettered discretion to scour transactions for concerns. No notice was given as to what might constitute grounds for denial or subjects for investigation. Instead, *the County agents made up the rules as it went.* (emphasis added).

As a certificated telecommunications wholesale provider in the state of California (U-6090-C; U-6194-C),[14] Global Photon and Global West do not provide telecommunications to end users, but to other (including retail) carriers. Neither company provides service in the many cities and towns through which their facilities must pass; generally, the network does not create ***any*** disruption to the public rights of way because wherever possible it uses existing conduit facilities and support structures of other carriers, such as the ILEC.

But like all other facilities-based providers, it is confronted with demands from local, state and even federal authorities that range from unreasonably burdensome to extortionate. In the deployment of its California coastal network, Global Photon faced onerous application, permitting, environmental and regulatory requirements and demands for lump-sum payments in the hundreds of thousands of dollars, not to mention revenue-based recurring payments. All are at odds with prevailing law and Commission policies.[15]

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[14] Granted in California Public Utilities Commission Decision Nos. 98-11-073 (Nov. 24, 1998) and 99-06-076 (June 22, 1999), respectively. Modified to permit construction of an undersea and terrestrial telecommunications network, D.00-11-037 (Nov. 21, 2000). Modified further to clarify Commission response to minor route changes in D. 01-05-027 (May 3, 2001).

[15] *See, e.g., Classic Telephone, supra* note 5; *Oakland County, supra* note 6. *See also Implementation of Section 302 of the Telecommunications Act of 1996,* Second Report and Order, CS Docket No. 96-46; FCC 96-249, at ¶ 210: "To use the examples of the Michigan Cities, et al., local authorities will retain their ability to address the following valid local concerns: (1) coordination of construction schedules, (2) establishment of standards and procedures for constructing lines across private property, (3) determination of insurance and indemnity requirements, and (4) establishment of rules for local building codes. [citation omitted] Similarly, the National League of Cities, et al. cites the following responsibilities of state and local governments, that we believe are consistent with nondiscriminatory and competitively neutral management of the rights-of-way: (1) scheduling common trenching and street cuts, (2) repairing and resurfacing construction-damaged streets, (3) ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable, and similar companies, and (4) keeping track of the various systems using the rights-of-way to prevent interference among facilities. [citation omitted]." Numerous court cases have relied on these Commission rulings for interpretive assistance including, *inter alia*, *Auburn*, 247 F.3d at 982; *Berkeley*, 146 F.Supp.2d at 1098-99; *TCG New York,* 125 F.Supp.2d at 90; *PECO v. Township of Haverford,* 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999); *Bellsouth Communications v. Town of Palm Beach,* 127 F.Supp.2d 1348, 1352-53 (S.D. Fla. 1999); *Bellsouth Communications v. City of Coral Springs,* 42 F.Supp.2d 1304, 1308 (S.D. Fla. 1999); *Bell Atlantic v. Prince George's County,* 49 F.Supp.2d 805, 815 (D.C. Md.1999), *vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000); *AT&T Communs. of the Southwest v. City of Dallas,* 8 F.Supp.2d 582, 591-92 N.D. Tex. (1998).

A. Local Entry Barriers

Because of the unique nature of Global Photon's network architecture, the company was uniquely vulnerable to municipal extortion during the permit process. As the following stories show, local permit agencies in California placed astronomical financial tolls in the path of Global Photon's network deployment. Unless the company paid the tribute to the local chiefs, the company would be literally and figuratively barred from landing is submarine fiber optic system, rendering the company's multimillion dollar network worthless as a commercial telecommunications network to the company, and as a vital redundant telecommunications facility to the state linking California's major population centers.

Global Photon's submarine cable is buried along the California Coast within state waters between three to twelve miles offshore. The Company's plan, as authorized by the CPUC, the State Lands Commission and the California Coastal Commission, was to bring the cable ashore through state waters at strategic landing sites on the California Coast. From a point approximately 0.5 miles offshore of each landing site, the submarine cable in threaded by divers into steel conduit. The conduit is installed by horizontal directional drilling from the shore, ~100 feet below the surface, to avoid any potential environmental impacts from trenching across beaches and near-shore areas. The steel conduit leads directly to a new onshore manhole where the submarine cable is spliced or connected to the terrestrial cable where the onshore cable route begins.

In order for this design to work, Global Network had to find strategic locations to bring the submarine cable ashore. In virtually every instance, at each landing site, local governments have exacted huge tributes for the right to connect this intra-state, California certificated cable, a

tribute that bore no nexus between the permit and its impact on the city or county's property or rights-of-way.

1. Local Permitting Agencies ("LPA") A and B

The principal landing site in the Los Angeles basin is City A.[16] This particular landing is vital as it is the gateway for Global Photon's network to connect into the Global West POP in Los Angeles, and provide service north to the International Gateway in San Luis Obispo, and on to San Jose and San Francisco, and service south to San Diego. The terrestrial interconnect for this location is approximately 0.6 miles from the shore end and requires cable to be pulled through existing conduit through several jurisdictions.

It is also different because it is subject to two concurrent jurisdictions, LPA A and LPA B. LPA B owns the property and LPA A manages it.

Having already obtained environmental approvals and permits from the California Coastal Commission, the State Lands Commission and the Army Corps of Engineers for the landing, Global Photon was nevertheless required to obtain a Coastal Development Permit, Use Permit and Encroachment Permit from LPA A and a Permit from LPA B's Department of Beaches and Harbors – six (6) layers of permits. Although not cast as payment for the permits, Global West was asked to "voluntarily" contribute $350,000 into the LPA A's Beach Strand Improvement Fund in order to obtain the LPA A permits. The payment was required despite the fact that the beach use was uninterrupted during construction and the use will have no impact on the property after construction.

[16] For numerous reasons, including possible retaliation and/or negative political fall-out, Global Photon wishes to keep the exact identities of certain cities confidential. Global Photon will identify these cities at the Commission's request and with appropriate confidentiality protections.

In addition to LPA A's requirements, LPA B exacted a one-time nonrecurring payment of $160,000 for "the repair and reconstruction of any adjacent beach facility the county deems necessary and appropriate." Global West was also required to pay LPA B a monthly rental fee that started at $1,000 per month prepaid for the first twelve months and thereafter tied to changes in the Consumer Price Index. Moreover, LPA B's Chief Information Officer requested "dark fiber or spare capacity" and Global West ultimately agreed to provide LPA B an option to purchase dark fiber or spare capacity at a discounted rate. This kind of tribute, unfortunately, is not unique.

2. LPA C

City B lies on the California Coast in Central California. It is the landing site of several transpacific communications lines and a key interconnection point for international and west coast carriers. In order to land its submarine cable in City B, Global West had to accede to a number of onerous demands. One absurd demand the company successfully averted was a demand for a possible ownership interest in the company. When Global West first approached City about a permit to land, the city requested information on the financial projections of the company, including balance sheets, and proposed, as a condition of the right to land on city property, stock options in the company.

LPA C did require a Special Use Permit ("SUP") in order to construct the landing site in a beach access parking lot. For the SUP, Global agreed not only to deposit a financial security of 150% of construction costs and to hire a qualified archaeologist to monitor grading and excavation of the landing site, it also agreed to pay $10,000 into a Marine Engine Replacement Fund for the first four weeks of drilling, and $1,000 per week thereafter. Among the standard

conditions of the SUP is a $5,000 per-day penalty for failure to complete construction 45 days after commencement of drilling.

In addition to the SUP for construction, LPA C required Global West to sign a License Agreement with LPA C granting Global West authority for the "installation, use, repair, maintenance and operation of its own underground fiber-optic cable connecting Global West's terrestrial communications network with its offshore, undersea fiber optic communication network and for no other purpose." For this License Agreement, Global West was required to agree to pay the City $750,000 in five $150,000 annual installments. Moreover, in order to obtain an encroachment permit for any construction in the City's rights-of-way connecting the terrestrial route to the submarine cable, Global West was required to agree to a franchise fee of $.95 per lineal foot for 13,480 feet of cable routed through the city. Finally, Global West agreed to make annual payments to the a local homeowners association of $6,000.00 for a term of 10 years, for city maintenance of their parking lot.

In addition to these fees, like City A, another government agency exercised concurrent jurisdiction over the landing. In this instance, the agency assessed a fee of $250,000 for a 25-year easement to cross under a 100-foot strip of beach. In total, Global West paid well over $1 million dollars to governmental entities simply for the right to bring its fiber cable ashore in this coastal city.

3. LPA D

For its landing site in LPA D, the Global West had to sign an outrageous License Agreement. The compensation structure for this License Agreement follows:

1. For use of the beach and parking lot during construction: $6,000 per week for the first four weeks, $11,000 per week thereafter.

2. For the initial 5-year license term: $300,000

3. Annual compensation for City rights-of-way: $6,973 at $3.65 per linear foot for any trench cut; $0.95 per linear foot for installation of any conduit; $0.643 per linear foot where existing conduit is used.

4. One additional two-inch conduit for the City's exclusive telecommunications use

In addition, Global West is under an obligation to deliver to LPA D a certified account of compensation paid to "Other Cities," including LPAs A and C. In this modified "most favored nations" provision, Global West must pay the difference between $300,000 and the highest amount paid to other cities.

Global West also is under an obligation to install its facilities within existing ducts or conduits whenever that conduit is available on "reasonable terms."

The company also is prohibited from assigning its network to a third party without the consent of LPA D, consent for which is conditioned, in part, on LPA D's review of the financial condition of the assignee. As a ludicrous transfer consent qualification, the License Agreement arbitrarily establishes that a certified net worth of $20 million deems a proposed assignee financially qualified.[17]

Finally, Global West was required to waive its right to any legal challenge of the License Agreement.

In addition to incredible fees and permit conditions, local governments have used their permitting authority to impose intolerably long delays on projects. In one city, obtaining a

[17] In comparison, the California Public Utilities Commission requires applicants only to demonstrate a minimum of $100,000 in cash or cash equivalent reasonably liquid and readily available to meet its start-up expenses.

permit to lay fiber through a parking lot took over two and a half years and it was not until the Governor's Office interposed was action forthcoming on the permit.

The brazenness of these local government demands is even more stunning considering that, in addition to federal court rulings prohibiting payment of non-cost-based fees to state and local permit agencies,[18] California state law is clear that municipalities are prohibited from imposing franchise requirements and extracting franchise fees as a condition of right-of-way access.[19] Moreover, since the early 1900s, California courts consistently have interpreted state law to prohibit local franchising of telephone and telecommunications companies.[20] Nevertheless, carriers such as Global Photon remain vulnerable to these exactions because of the simple economic proposition they face--it's cheaper to pay the toll than to wait indefinitely for a permit authorization, the delay for which may cost the company millions of dollars in lost revenue or additional construction costs. The jury is still out regarding whether small but vital companies like Global Photon can continue to pay the ransoms demanded and still remain

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[18] *See Auburn,* 247 F.3d at 981 ("Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right-of-way, as required under the Telecom Act"); *Berkeley,* 146 F.Supp.2d at 1100 ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local rights of way").

[19] Cal. Gov. Code § 50030 (1999) states: "Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, upgrading of telecommunications facilities...shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes." *See also Pacific Tel. & Tel. v. City of Los Angeles,* 44 Cal.2d 272, 283 (1955) (city may not exact a franchise fee from the telephone company where the city has no telephone franchising authority).

[20] Notable cases include *City of Pomona v. Sunset Tel. & Tel.* 224 U.S. 330, ***15 (1912) (the power to grant franchises for the use of highways in a city inheres in the state); *County of Inyo v. Hess* 53 Cal. App. 415, 425 (1921) ("telephone corporations are granted the right and privilege to use public highways over which to construct and operate telephone wires, free from any grant made by subordinate legislative bodies"); *County of Los Angeles v. Southern Cal. Tel. Co.* 32 Cal.2d 378, 384 (1948) (Cal. Pub. Util. Code § 7901 "has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways...and that vested right cannot be impaired by subsequent acts of the Legislature"); *Pacific Tel. & Tel. v. City and County of San Francisco* 51 Cal.2d 766, 768 (1959) ("construction and maintenance of telephone lines in the streets and other public places within the city is a matter of state concern... the city cannot exclude telephone lines from the streets on the theory that 'it is a municipal affair'"); and *Pacific Tel. & Tel. v. City and County of San Francisco* 197 Cal.App.2d 133, 152 (1961) ("the state has retained

financially viable. The cities willingness to flout state law has made intervention at the federal level an imperative. Without diminishing the role of the state Public Utilities Commission over fundamental certification and service regulation, or the proper role of local government over location and manner permitting, the Commission can perform a vital and revitalizing function within California and around the country by clarifying the limitations imposed on municipalities by Section 253 and providing carriers with quick remedies in the face of clear governmental abuses.

B. State Barriers

Global Photon's rollout has been injured significantly by the unreasonable demands of local government; unreasonable state requirements and demands have also slowed and hampered its deployment, without a corresponding upside.

1. California Public Utilities Commission ("CPUC")

While Global Photon has an excellent working relationship with the CPUC and its staff, there is one highly unusual requirement in California that imposes a formidable entry barrier. The California Environmental Quality Act was enacted to require that public agencies not approve any publicly or privately initiated projects that are likely to have significant environmental impacts unless the impacts are avoided or are mitigated to the point of insignificance as a condition of approval.[21]

For almost two years, after the state Attorney General and other state agencies notified the CPUC that its "batched" environmental approvals and mitigation measures did not comply

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to itself the broader police power of granting franchises, leaving to the municipalities the narrower police power of controlling location and manner of installation").

[21] California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 *et seq.* *See Mountain Lion Foundation v. Fish and Game Commission,* 16 Cal.4th 105, 134 (1997) ("a decision-making agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures").

with CEQA, the CPUC has refused to grant telecommunications carriers statewide construction authority.[22] Rather the CPUC has resorted to a bifurcated process in which carriers are required to use existing facilities under a "limited" facilities-based certification or to conduct lengthy and expensive site-specific environmental impact analyses in order to construct their own facilities.[23]

Therefore, like many carriers in California, if Global Photon seeks to deviate from the network route on file and approved by the CPUC, it is required to seek advance permission from the CPUC for that route modification. For example, if Global Photon identifies a more efficient route for the terrestrial part of its network than that originally approved by the CPUC, or, if it enters into a contract to serve a customer that is not located on the route on file, it must file a petition for modification with the CPUC. Under the very best of circumstances, this requirement (in addition to all the local permitting and other requirements) adds minimally two months or more of delay to the deployment process. While the CPUC has recently indicated that "minor changes" in network routes "under certain circumstances" may not require a formal modification petition, these minor changes still require consultation with PUC staff.[24] In other words, even though a formal filing may not be required, PUC staff involvement is. This level of micro-

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[22] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service,* Decision No. 99-10-025 (Oct. 7, 1999), p. *7 ("Until the Negative Declaration can be satisfied, the CEQA requirements for certification of the petitioners' projects remain unsatisfied, and granting of full facilities-based local exchange authority ...must be deferred").

[23] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service,* Decision No. 99-12-050 (Dec. 16, 1999), p. 6 ("Where the CLC petitioner is merely asking for limited facilities-based authority involving the use of UNEs or other equipment placed within previously existing buildings or structures, the requested authority can be granted.... If, however, such carriers subsequently seek to offer expanded service involving construction activities...they will have to file a new application for facilities-based CPCN authority and comply with any applicable CEQA requirements...")

[24] *See* Exhibit 6, *Application of Global Photon Systems, Inc. and Global West Network Inc. for authority to modify their Certificates of Public Convenience and Necessity to Permit Construction of Specific Telecommunications Facilities*, Decision No. 01-05-027 (May 3, 2001), p. 5 ("We take this opportunity to revise the language in D.00-11-037 to direct Applicants to consult with our staff about the need for further modifications of their [CPCNs]").

regulation by the state agency, which has the power to order a statewide shut-down, presents an entry barrier to the provision of telecommunications services and is contrary to the goals and purposes of the Telecommunication Act of 1996.

2. State Lands Commission

The California State Lands Commission ("SLC") imposes yet another entry barrier. In order to land its submarine fiber optic cables in Central and Northern California, Global Photon was required to obtain a permit from the SLC. The permit covered the public rights-of-way over certain tide and submerged lands of the State of California. Notwithstanding Global Photon's authorization as a certificated "telephone corporation"[25] in California, the SLC permit nevertheless sought to regulate the services of Global Photon by limiting its "rent free" permit to the provision of certain types of telecommunications services.

Specifically, prior to the issuance of its SLC permit, counsel for SLC required the company to certify in writing that "the equipment and facilities to be located within the public lands will be operated by Global Photon as a public utility under authority of the CPCN for the purpose of providing telephone communications services to the public on a non-discriminatory basis." [26] Despite the fact that the SLC determined that the "authorized improvements [to state lands] will not unreasonably interfere with the public use of the [to state lands] or interrupt the navigation of the overlying waters if carried out in accordance with the terms and conditions and covenants of this Permit," the agency nevertheless wanted to limit the scope of the permit to certain types of services provided over the network, to the exclusion of other innovative services

[25] The term "Telephone Corporation," as defined in Calif. PU Code §234(a) "includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

[26] *See* Exhibit 7, Letter from SLC Staff Counsel Richard D. Nobles to Counsel for Global Photon, dated January 20, 2000.

the company may choose to deploy in the future.[27] In addition, the SLC conditioned the permit on the right to audit Global Photon's service offerings by reviewing its books with respect to the "use of the facilities and equipment on the premises."[28]

Section 7901 of the California Public Utilities Code authorizes telephone companies to utilize the public rights of way free of any local franchising or franchise fee requirements.[29] Section 7901 is an unconditional grant of access to the public rights-of-way. The statute does not limit the types of services that may be provided over the facilities located on state land.[30]

In attempting to regulate the service offerings of Global Photon, SLC attempted to graft onto California law a limitation that otherwise does not exist on types of services California "telephone companies" can provide over facilities in the public rights-of-ways owned by the state in clear violation of long standing precedent from the California Supreme Court.[31] This defiance in the face of state law underscores the need for the Commission to recommend to Congress that Section 253's prohibition on entry barriers not be limited to telecommunications services offered on a common carrier basis. Telecommunications carriers must be able to deploy networks capable of delivering existing as well as future competitive service offerings, unrestrained by artificial limits on service offerings imposed by state and local permit agencies. This is

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[27] *See* Exhibit 8, Section 4.2(a) of SLC State Lease PRC 8168.9.

[28] *Id.*, at 4.2(b).

[29] *See* Calif. PU Code Sec. 7901, which states in pertinent part: "...Telephone corporations may construct ... telephone lines along and upon any public road or highway, along or across any of the waters of lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and as such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

[30] *Pacific Tel. & Tel. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 ("if the state franchise granted to a telephone company were limited to the transmission of 'articulate speech,' [as the City claims], the company would be required to obtain numerous local franchises in order to give its subscribers the benefit of the many and varied uses of telephone wires.... Such a result would defeat the very purpose of Section [7901]."

[31] *Id.*